

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AARON L. ECHTINAW,) CASE NO. C09-0024-RSL
)
 Plaintiff,)
)
 v.) REPORT AND RECOMMENDATION
)
 MICHAEL J. ASTRUE, Commissioner)
 of Social Security,)
)
 Defendants.)
)

Having prevailed in his appeal of a decision by the Commissioner of the Social Security Administration, plaintiff moves for an award of attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. (Dkt. 17.) Plaintiff requests \$7,282.03 in attorney's fees. The Commissioner objects to plaintiff's request for an award of attorney's fees and alternatively argues that the number of hours requested is excessive and that the hourly rates are unreasonable. (Dkt. 19.)

Having considered the materials submitted in support of and in opposition to plaintiff's motion, the Court recommends that plaintiff's motion (Dkt. 17) be GRANTED in part and DENIED in part and that plaintiff be awarded \$6,793.01 in attorney's fees.

BACKGROUND AND DISCUSSION

02 Plaintiff filed a claim for Supplemental Security Income (SSI) in April 2003.
03 Following a hearing, an Administrative Law Judge (ALJ) found plaintiff not disabled.
04 Plaintiff appealed the decision to the Appeals Council, which denied plaintiff's request for
05 review. Following an appeal to this Court, the parties stipulated that the case be reversed and
06 remanded for further administrative proceedings, and the Appeals Council remanded the case
07 to the ALJ. The ALJ held a second hearing and thereafter again found plaintiff not disabled.

8 Plaintiff filed a second civil action in this Court for review of the Commissioner's final
9 decision. The Court issued a Report and Recommendation that recommended remanding the
10 matter for an award of benefits. (Dkt. 14.) The Court found that the ALJ erred in his
11 consideration of medical opinions and failure to address lay testimony, but rejected an
12 argument that the ALJ failed to fully consider a particular diagnosis. The Court concluded
13 that, crediting the opinions and lay testimony as true, plaintiff should be awarded benefits.
14 The Honorable Robert S. Lasnik adopted the Report and Recommendation without objection.
15 (Dkt. 15.)

16 Plaintiff asserts that the Commissioner's position in opposing his claim was not
17 substantially justified and that, as the prevailing party, he is entitled to an award of attorney's
18 fees. He seeks attorney's fees for a total of 40.1 attorney hours and requests that the fees be
19 calculated at varying monthly rates, ranging from \$180.54 per hour to \$182.57 per hour for
20 work performed between January and October 2009. (Dkt. 17 at 5.)

21 The Commissioner opposes both plaintiff's entitlement to fees and the number of hours
22 and rates requested. He requests, if the Court concludes that his position was not substantially

01 justified, that plaintiff's total billable hours be reduced by at least 9.3 hours, to 30.8 hours total,
02 and that plaintiff be held to an hourly rate of \$172.85.

03 A. Government's Position

04 Under the EAJA, the Court awards fees and expenses to a prevailing party in a suit
05 against the government unless it concludes that the position of the government was
06 "substantially justified[.]" 28 U.S.C. § 2412(d)(1)(A). The Commissioner's position is
07 deemed substantially justified if it meets the traditional standard of reasonableness, meaning it
08 is "justified in substance or in the main, or to a degree that could satisfy a reasonable person."
09 *Lewis v. Barnhart*, 281 F.3d 1081, 1083 (9th Cir. 2002) (quoted sources and internal quotation
10 marks omitted). While the government's position need not be correct, it must have
11 "reasonable basis in law and fact." *Id.* (citing *Pierce v. Underwood*, 487 U.S. 552, 566 n.2
12 (1988)). "'The government bears the burden of demonstrating substantial justification.'"
13 *Thangaraja v. Gonzales*, 428 F.3d 870, 874 (9th Cir. 2005) (quoting *Gonzales v. Free Speech
14 Coalition*, 408 F.3d 613, 618 (9th Cir. 2005)).

15 In arguing substantial justification of the government's position, the Commissioner
16 focuses on the ALJ's assessment of the medical opinions in this matter. The Commissioner
17 points to evidence that plaintiff's condition had improved and stabilized on medication and
18 maintains that his position was substantially justified in that it had a reasonable basis in both
19 law and fact. *See Warre v. Commissioner*, 439 F.3d 1001, 1006 (9th Cir. 2006) ("Impairments
20 that can be controlled effectively with medication are not disabling for the purpose of
21 determining eligibility for SSI benefits.") and (Dkt. 14 at 7 (the Report and Recommendation
22 acknowledged that the record "allows an inference that plaintiff's mental status improved with

01 medication”)).

02 However, the Commissioner does not address the Court’s conclusion that the ALJ erred
03 in failing to address evidence from a treating Clinical Case Manager. (Dkt. 14 at 11-12.) As
04 noted in the Report and Recommendation, an ALJ must provide specific reasons for rejecting
05 such lay testimony. (*Id.* (citing 20 C.F.R. § 404.1513(d); Social Security Ruling 06-03p; and
06 *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1984)). *See also Lewis v. Apfel*, 236 F.3d 503,
07 511 (9th Cir. 2001) (“[L]ay testimony as to a claimant’s symptoms is competent evidence that
08 an ALJ must take into account, unless he or she expressly determines to disregard such
09 testimony and gives reasons germane to each witness for doing so.”) “[W]here the ALJ’s error
10 lies in a failure to properly discuss competent lay testimony favorable to the claimant, a
11 reviewing court cannot consider the error harmless unless it can confidently conclude that no
12 reasonable ALJ, when fully crediting the testimony, could have reached a different disability
13 determination.” *Stout v. Commissioner, Soc. Sec. Admin.*, 454 F.3d 1050, 1056 (9th Cir. 2006).

14 In this case, the ALJ did not mention the lay testimony and the Commissioner did not
15 respond to plaintiff’s argument regarding that testimony. Likewise, the Commissioner herein
16 does not argue his opposition to plaintiff’s civil action was substantially justified despite the
17 ALJ’s failure to address the lay testimony. Accordingly, the Court concludes that the
18 government has not met its burden of demonstrating substantial justification. The Court,
19 therefore, finds no basis for the Commissioner’s opposition to plaintiff’s request for an award
20 of EAJA fees.

21 B. Attorney Hours

22 The Court may award EAJA fees for attorney hours reasonably expended by plaintiff’s

01 counsel. 28 U.S.C. § 2412(d)(2)(A). “[E]xcessive, redundant, or otherwise unnecessary”
02 hours should be excluded from the fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983).
03 The Court must provide a “concise but clear explanation” of its reasons for a fee award. *Gates*
04 *v. Deukmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992).

05 The Commissioner takes issue with attorney hours billed for this disability matter. He
06 posits that 0.75 hours should have been adequate to prepare and file the one-page summons,
07 boilerplate complaint, and IFP in this motion, as opposed to the 1.5 hours requested. (See Dkt.
08 17, Ex. B.) He notes that plaintiff’s counsel claimed 4.7 hours on legal research despite the
09 fact that this case involved routine issues. (*Id.*) He asserts that plaintiff unreasonably seeks
10 fees for an argument that he should be found disabled based on a disorder for which he was
11 never diagnosed (Asperger’s Disorder). The Commissioner also avers that the Court should
12 subtract 1.1 hours plaintiff’s counsel billed for time spent meeting with, writing letters to, and
13 calling his client, noting that the time entries do not indicate what legal work was done or why
14 the time is being billed to the Commissioner. (*Id.*) Lastly, the Commissioner notes that
15 plaintiff’s counsel bills for items that combine both legal and clerical work, such as 2.0 hours
16 spent editing, filing, and serving a brief, while the latter two tasks are clerical or administrative
17 in nature. (*Id.*)

18 The Commissioner maintains that 40.1 hours for the prosecution of this relatively
19 simple and routine case is excessive and unreasonable. *Cf. Patterson v. Apfel*, 99 F. Supp. 2d
20 1212, 1213-15 (C.D. Cal. 2000) (finding 37.25 hours reasonable in a Social Security case
21 deemed “not routine” and wherein the parties appeared for an oral argument and the total
22 number of hours included the litigation of the EAJA petition). He points to cases from

01 different courts as providing guidance as to reasonable fee requests. *See, e.g., Penrod v. Apfel,*
02 54 F. Supp. 2d 961, 964 (D. Ariz. 1999) (finding 28.8 hours a reasonable expenditure of time in
03 a Social Security disability case); *Silva v. Bowen*, 658 F. Supp. 72, 73 (E.D. Pa. 1987) (reducing
04 54 claimed hours to 29 in a Social Security disability case that “was not particularly complex,
05 and did not raise novel issues.”) The Commissioner requests that, in this case, the Court
06 reduce the fee request by 9.3 hours, for a total of 30.8 hours.

07 There is no hard-and-fast cap on attorney fee awards that should be applied regardless of
08 the circumstances. *See, e.g., Patterson*, 99 F. Supp. 2d at 1214 n.2 (collecting cases involving
09 reasonable EAJA fee awards between 20 and 54.5 hours); *Gibson-Jones v. Apfel*, 995 F. Supp.
10 825, 827 (N.D. Ill. 1998) (awarding attorney’s fees for 65.75 hours of district court litigation).
11 This Court has previously approved attorney fee awards in Social Security cases for work
12 exceeding that requested by plaintiff in this case. *See, e.g., Vessel v. Astrue*, C08-0949-RSL,
13 Report and Recommendation (Sept. 19, 2009) (recommending a reduced fee award for 53.8
14 hours, which included 48.5 hours for the underlying litigation and 5.3 hours for the EAJA fee
15 application), *adopted without objections* by Order on Plaintiff’s Motion for EAJA Fees (Oct.
16 20, 2009); *Burleson v. Astrue*, C07-2019RSL, Report and Recommendation (Jan. 13, 2009)
17 (recommending a reduced fee award for 49.3 hours, which included 43.9 hours for the
18 underlying litigation and 5.4 hours for the EAJA fee application), *adopted without objections*
19 by Order on Plaintiff’s Motion for EAJA Fees (Feb. 9, 2009); *Riley v. Barnhart*, C04-168JLR,
20 Report and Recommendation (Mar. 8, 2005) (recommending a reduced fee award for 49.2
21 hours, which included 45.2 hours for the underlying litigation and 4 hours for the EAJA fee
22 application), *adopted without objections* by Order on Plaintiff’s Motion for EAJA Fees (Mar.

01 28, 2005).

02 In this case, plaintiff's counsel did not expend an unreasonable amount of time on any
03 particular task. Counsel provided useful, relevant, and detailed discussions of the facts,
04 authority, and administrative record. Although the Court did not agree with all of plaintiff's
05 arguments, none were frivolous or advanced in bad faith. Plaintiff is entitled to the attorney's
06 fees incurred for the work performed in pursuit of the ultimate result, including efforts
07 expended on unsuccessful issues. *See Hensley*, 461 U.S. at 435 ("Litigants in good faith may
08 raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to
09 reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.")

10 Nor does the Commissioner demonstrate improper billing as a general matter.
11 "[P]laintiff's counsel 'is not required to record in great detail how each minute of his time was
12 expended.'" *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1121 (9th Cir. 2000) (quoting *Hensley*,
13 461 U.S. at 437 n. 12). "Instead, plaintiff's counsel can meet his burden - although just barely
14 - by simply listing his hours and 'identifying the general subject matter of his time
15 expenditures.'" *Id.* (finding denial of fee application an abuse of discretion where the fee
16 request included summaries of tasks such as "pleadings and pretrial motions") (quoting *Davis v.*
17 *City of San Francisco*, 976 F.2d 1536, 1542 (9th Cir. 1992) (quoting *Hensley*, 461 U.S. at 437 n.
18 12)). Here, plaintiff met this "basic requirement." *Id.*

19 The Court does, however, recommend one adjustment in the hours as identified by the
20 Commissioner. "[P]urely clerical work or secretarial tasks should not be billed at a paralegal
21 or lawyer's rate, regardless of who performs them." *Missouri v. Jenkins*, 491 U.S. 274, 288 n.
22 10 (1989). In this case, plaintiff's counsel included time spent on the clerical tasks of filing

01 and serving various documents in this matter. (See Dkt. 17, Ex. B.) “[T]he Court should
02 reduce the hours requested to account for the[se] billing errors.” *Nadarajah v. Holder*, 569
03 F.3d 906, 921 (9th Cir. 2009) (reducing hours for time spent on the clerical tasks of filing,
04 transcript, and document organization). The precise amount of time spent on these tasks is not
05 clear given that plaintiff’s counsel grouped the clerical tasks with other, non-clerical work.
06 (Dkt. 17, Ex. B (1.0 hours for preparing and filing complaint, in forma pauperis motion, written
07 consent and declaration; 0.8 hours for preparing and serving summons and complaint; 2.0 hours
08 for editing, filing, and serving opening brief; 1.7 hours for preparing, filing, and serving EAJA
09 application, memorandum, and exhibits).) The Court, therefore, recommends that the hours be
10 reduced by 0.2 hours for each time entry at issue, for a total reduction of 0.8 hours.

11 In sum, the Commissioner does not support his contention that plaintiff’s counsel spent
12 an unreasonable amount of time on this matter, but the Court does find improper the inclusion
13 of purely clerical matters in the billing. Accordingly, the Court recommends that the attorney
14 fee award should be reduced by 0.8 hours, leaving a total of 39.3 hours.

15 C. Hourly Rate

16 The EAJA includes a statutory maximum hourly rate of \$125.00 per hour “unless the
17 court determines that an increase in the cost of living or a special factor, such as the limited
18 availability of qualified attorneys for the proceedings involved, justifies a higher fee.” 28
19 U.S.C. § 2412(d)(2)(A); *Thangaraja*, 428 F.3d at 876; *Sorenson v. Mink*, 239 F.3d 1140, 1148
20 (9th Cir. 2001). To adjust the EAJA fee cap for increases in the cost of living, courts in the
21 Ninth Circuit multiply \$125.00 by the appropriate consumer price index for urban consumers
22 (“CPI-U”) for the year in which the fees were incurred, then divide by the CPI-U for the month

01 in which the cap was imposed (March 1996). *Thangaraja*, 428 F.3d at 876-77; *Sorenson*, 239
02 F.3d at 1148.

03 Utilizing monthly changes in the consumer price index for 2009, plaintiff seeks
04 attorney's fees at rates ranging from \$180.54 per hour to \$182.57 per hour for work performed
05 between January and October of this year. (Dkt. 17 at 5.) The Commissioner objects to a rate
06 exceeding that of the 2008 hourly rate of \$172.85, *see* http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000039, given the absence of a cost of living increase this year (*see* Dkt.
07 19, Attach. 1 (October 15, 2009 Social Security Administration news release stating that,
08 because there was no increase in the consumer price index, there would be no cost-of-living
09 adjustment in social security benefits)). He maintains plaintiff should not get the benefit of
10 2009 monthly spikes in the cost of living without agreement by the Ninth Circuit Court of
11 Appeals.

13 The website for the Ninth Circuit provides an adjusted hourly rate for EAJA cases in the
14 year 2008 of \$172.85, but does not yet reflect a rate for 2009. *See* http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000039. Documentation submitted by the Commissioner
15 reflects the absence of an increase in the consumer price index from the third quarter of 2008 to
16 the third quarter of 2009. (Dkt. 19, Attach 1.) Plaintiff did not submit a reply in support of
17 her motion and, therefore, did not respond to this or any other argument raised by the
18 Commissioner. With the evidence now before the Court, the undersigned recommends that, as
19 argued by the Commissioner, plaintiff's counsel be held to the 2008 rate of \$172.85 per hour for
20 work performed in this case.

22 / / /

CONCLUSION

02 Consistent with the discussion above, the Court recommends that plaintiff's motion be
03 GRANTED in part and DENIED in part. It is recommended that the attorney hours claimed by
04 plaintiff be reduced by a total of 0.8 hours. After this reduction, plaintiff would be allowed a
05 total of 39.3 hours for attorney time in this matter (37.8 hours for the underlying litigation and
06 1.5 hours for the EAJA fee application) at an hourly rate of \$172.85. The total recommended
07 award for attorney's fees would be \$6,793.01. A proposed Order accompanies this Report and
08 Recommendation.

DATED this 9th day of December, 2009.

Mary Alice Theiler
Mary Alice Theiler
United States Magistrate Judge